REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 198 of 2006

LUSIA N.A. LISECHE……APPELLANT

VERSUS

DANIEL MBURU KINYANJUI……....1ST RESPONDENT
ALI HUSSEIN ABUBAKAR…….2ND RESPONDENT

(Appeal from the judgment of the Principal Magistrate's Court at Nairobi, Milimani Commercial Courts (Hon. Ms E.N. Maina), dated 8th March, 2006 in CMCC No.11361 of 2003).

J U D G M E N T

1. The appellant Lusia N.A. Liseche was involved in an accident along Kakamega Kisumu Road on 24th July, 2001. She claimed to have been knocked down by Motor Vehcile Registration No.KAM 599. The appellant filed a suit in the Chief Magistrate's Court at Nairobi against the respondent Daniel Mburu Kinyanjui, the owner of the subject vehicle, contending that the accident was caused by his negligence or the negligence of the respondent's driver or agent.

2. The respondent filed a defence in which he contended that the plaint was materially defective. The respondent further denied the occurrence of the accident or the negligence attributed to him, and averred in the alternative that if the accident occurred, then the same was caused by the negligence of the appellant. The respondent further denied that the court had the geographical jurisdiction to hear the suit.

3. The issue of jurisdiction was taken up as a preliminary issue and the trial court upheld the objection, contending that the suit should have been filed in Kakamega. The trial court had the suit stood over generally, to enable the appellant make a relevant application to the High Court under Section 14 of the Civil Procedure Act, for transfer of the suit to a court of competent jurisdiction.

4. About 1½ years later the suit was listed for hearing before the Principal Magistrate, and 2 witnesses testified in proof of the appellant's case. The respondent did not call any witness but filed submissions, in which it urged the trial court to dismiss the appellant's suit. The judgment of the trial which was short and to the point, stated in part as follows:

> ***"First of all this case is not properly before this court and it is not correct as submitted by the learned advocate for the plaintiff that leave was granted for the matter to be heard here. A preliminary objection was raised on the issue of jurisdiction. On 28.8.04 my sister the Honourable Mrs. Owino sustained the objection and stayed the suit so that it could be transferred. The leave counsel for the plaintiff has alluded to was not exhibited and there is no evidence at all that an application was made to the High Court either for the transfer of the case or for the mater to be heard here.***
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> ***Secondly, the plaintiff admitted that she did not swear the verifying affidavit filed together with the plaint herein. The rule in regard to verification of plaints is clear. The affidavit shall be sworn by the plaintiff but not by anybody else and on that ground too her claim must fail as the plaint is not properly verified.***
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> ***Even on the merits she has not proved the particulars of negligence. She did not state exactly where she was or how the motor vehicle hit her. She claims to have been conscious only of leaving her house to go to church and to finding herself in hospital. She did not call an eye witness to this accident and it is trite law that the onus of proof does not shift. The injuries sustained are however serious and had I found the defendants liable I would have awarded her a sum of Kshs.600,000/=. The pleaded specials had also been proved and the same would have been awarded too. The suit is however dismissed with costs to the defendants. It is so ordered".***

5. In her memorandum of appeal, the appellant has raised 5 grounds as follows:

(i) That the learned trial magistrate erred in law and in fact by holding that the plaintiff had not approved her claim against the defendants on a balance of probability when the same had been proved to the required standard in law.

(ii) That the learned trial magistrate erred in law in fact by holding that the suit before her was not properly before the court, when this issue was not for determination by the court.

(iii) That the learned trial magistrate erred in law and in fact by not giving due regard to an order given by the High Court of Kenya on the 12th day of May, 2005 bestowing jurisdiction to the lower court, to hear the instant matter.

(iv) That the learned trial magistrate erred in law and in fact by failing to uphold the uncontroverted evidence on record of the plaintiff.

(v) That the learned trial magistrate erred in law and in fact by not considering determination of the suit before her in the interests of justice and not mere legal technicalities.

6. Mr. Orwa who appeared for the appellant submitted that the appellant proved his case to the required standard. He maintained that the issue of the suit not being properly before the court, was not an issue for determination before the trial court. He therefore urged the court to allow the appeal.

7. Mr. Wanyoike who appeared for the respondent pointed out that the appellant admitted that she was not the one who had signed the verifying affidavit, which was filed in support of the plaint. Mr. Wanyoike argued that the provisions of Order VII Rules 1(2) of the Civil Procedure Rules were not complied with, and that the appellant's suit was therefore defective. On the issue of jurisdiction Mr. Wanyoike referred the court to the preliminary objection which was raised in the lower court and the consequent order. Mr. Wanyoike maintained that there was nothing to show that the appellant complied with the court order. Finally, it was contended that the appellant's evidence was not corroborated, and that the doctor who testified examined the appellant 4 years after the accident.

8. I have carefully considered the record of the lower court, the pleadings, the judgment of the trial court, the memorandum of appeal and the contending submissions. I do note that at paragraph 2 of the defence, the respondent raised the issue of the competence of the plaint, while the issue of jurisdiction was raised in paragraph 11 of the defence. Therefore, these were triable issues raised in the pleadings. The trial magistrate was obliged to address the issues during the trial.

9. The issue of jurisdiction was dealt with as a preliminary issue, and a ruling delivered upholding the respondent's contention that the Chief Magistrate's Court at Nairobi did not have the geographical jurisdiction to entertain the suit. The appellant did not appeal against that ruling. Although the appellant proceeded to list the suit for hearing, and although the appellant contended before this court that orders had been made in the High Court for the hearing of the suit to proceed before the Chief Magistrate's Court in Nairobi, there is no evidence that any such order was made or filed in the Chief Magistrate's Court. A copy of a consent letter dated 22nd April, 2005, is contained in the record of appeal. The letter which is addressed to the Deputy Registrar, High Court, seeks to have what purports to be a consent signed by the parties in HCCC Mis. App No.104 of 2005, consenting for the Chief Magistrate's Court at Nairobi to hear and determine RMCC No.11361 of 2003, recorded. Nevertheless, there is no evidence that that consent was ever recorded or adopted as an order of the court, nor is there any evidence that any such consent order was ever filed in the Chief Magistrate's Court at Nairobi in RMCC No.11361 of 2003 or brought to the attention of the trial magistrate. That letter has therefore been irregularly included in the record of appeal as it was not part of the original record of the lower court. Moreover, the advocate who has purported to sign the consent on behalf of the respondent is not the advocate who was on record in the Chief Magistrate's Court in RMCC No.11361 of 2003. Therefore, the trial magistrate's ruling that the suit was improperly before her cannot be faulted.

10. Secondly, as regards the competence of the plaint, the appellant admitted during cross-examination that it was her son who signed the verifying affidavit which was filed under Order VII Rule 1(2) of the Civil Procedure Rules. It is obvious that that affidavit was incompetent as Order VII Rule 1(2) of the Civil Procedure Rules requires that the affidavit verifying the correctness of the averment contained in the plaint be sworn by the plaintiff. The swearing of the verifying affidavit by the appellant's son purporting to be the appellant was indeed a fraud. In the circumstances, the trial magistrate was right in holding that the plaint was not properly verified. The result was that the trial magistrate ought to have struck out the plaint under Order VII Rule 1(3) of the Civil Procedure Rules.

11. Finally, as regards the evidence, although the respondent did not call any evidence, the burden remained entirely upon the appellant to prove her case. However, all the appellant testified to is that a vehicle came from behind her and hit her. There is absolutely no evidence as to how the accident occurred. In her plaint, the appellant had alleged particulars of negligence on the part of the respondent's driver, agent or servant as follows:

(a) Driving at a speed that was excessive in the circumstances.

(b) Failing to keep a proper look-out while driving on the said road.

(c) Failing to have any regard for the safety of other road users and in particular the plaintiff.

(d) Failing to have any adequate control of the said motor vehicle

(e) Failing to stop, slow down, swerve, brake or in any other manner manage the said motor vehicle so as to avoid the said accident.

(f) Causing or permitting the accident to occur.

(g) In so as it may be applicable, the plaintiff shall rely on the doctrine of *res ipsa loquitor*.

12. The appellant was under a duty to call evidence to establish these particulars of negligence which she alleged against the respondent. However, no such evidence was adduced. In the circumstances, the trial magistrate was right in coming to the conclusion that the appellant did not prove her claim. The upshot of the above, is that this appeal has no merit. It is accordingly dismissed. Given the circumstances of this case, I do not find it appropriate to award any costs. Each party shall therefore bear their own costs.

Dated and delivered this 17th day of May, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Miss Njagi H/B for Wanyoike .for the respondent

Eric - Court clerk